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90-957

Supreme Court, U.S.
FILED
DEC 10
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IN THE
Supreme Court of the United States
For The October 1990 Term

GARIE NEGRON,

Petitioner,

against

BANCO DE PONCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the bank make out of case for civil RICO violation, on a showing that it merely credited customers of its own VISA-MASTER CARD customer, causing an overdraft, without any showing that its own customer had committed any RICO racketeering acts to support Federal Jurisdiction?

2. May a Federal Court, consistent with due process of law, relieve counsel for a party in a civil case, without the consent of the party, and compel such party, to proceed to trial without counsel?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNOFFICIAL REPORT OF OPINION

On the 5th day of October, 1990, the United States Court of Appeals did enter an order affirming a judgment entered in the United States District Court for the Eastern Districe of New York (Nickerson, J.), awarding respondent treble damages plus attorneys' fees for civil violation of the RICO statute, a copy of which is included in the appendix. This opinion has not been officially reported.

GROUNDS FOR JURISDICTION

Jurisdiction is hereby invoked pursuant to 28 U.S.C. 1254.

DATE OF JUDGMENT

October 5th, 1990

STATUTORY PROVISION TO BE REVIEWED

18 U.S.C. 1964

STATEMENT OF THE CASE

This RICO action was commenced by an ex parte restraining order, staying NEGRON from transferring any property in her possession to the extent of $293,581. The affidavit of Robert Maisonet, a branch manager of the Banco de Ponce, recites that on the 21st day of January, 1987, Negron opened a checking account for Best Rate Travel Agency, at 100-05 Atlantic Avenue in Queens and solicited a Visa/Master charge-Merchants Agreement. The credit card account was opened after the bank inspected the travel agency.

During the second half of 1987, the bank noticed an unusual amount of chargebacks, which occurred by reason of customer requests. It was ascertained that the great majority of chargebacks were created by telephone orders by credit card, which Maisonet recites were not authorized. However, annexed to the affidavit was a copy of the Master Charge/Visa agreement authorizing a cardholder "to make a Card purchase without presenting his Card," which would seem to cover telephone purchases. Moreover, there was no prohibition of telephone sales in the "Member Agreement" and paragraph "5" of the Member Agreement specifically authorized telephone sales.

In July of 1987, Banco de Ponce ascertained that the travel agency was closed. On July 29, 1987, Negron was given notice that the Credit Card account was closed. From May 29, 1987 through July 31, 1987, there were depositis of $294,873. On the other hand, Banco de Ponce

could only recover chargebacks of $1,292. As of January 12, 1988, there was a debit balance of $43,505.50. Maisonet claimed a potential liability of $293,581, since there is no time limitation for returns "on fraudulent transactions", without any factual showing that any of the transactions were, in fact, fraudulent.

Maisonette recited that a technique called "telemarketing" was used. Maisonette then alleged, "Innocent customers were duped into giving their credit card number for nonexistent or misrepresented travel packages, which these customers thereafter rejected," without any identification of customers or the nature of the alleged misrepresentations.

Maisonet recited that Garie Negron owned property at 100-05 Atlantic Avenue, Richmond Hill and 95-27 76th Street, Ozone Park. It was also alleged that Negron transferred various sums from May of 1987 through August of 1987, concluding that they were fraudulent, without any recital of facts to support such accusation.

It was further alleged that Negron admitted that she engaged in a fraudulent marketing scheme and that she had been disposing of her assets, without details.

The jurisdictional basis alleged in the complaint is diversity of citizenship. The complaint alleged that the travel agency opened an account at the Banco branch located at 15 Graham Avenue in Brooklyn and entered into a Visa/Mastercard Member Agreement. It was alleged that the travel agency operated from January 21, 1987 to August 31, 1987.

The underlying complaint also names Irwin Sharpiro, Joseph Maiuro, Delco Tours, Inc. and "AAA" Holidays

International of South Florida, Inc., as codefendants. By the time the case reached trial, the codefendants entered into a settlement agreement with Banco de Ponce for the sum of thirty thousand dollars.

Count one charges Negron with common law fraud, by telemarketing trips to various points in the Caribbean and other places with air fair and hotel for $88.00, which vacations were not available and "through the use of sophisticated and subtle techniques" obtained credit card numbers from people. Then, it is alledge, the participants in the scheme would demand additional costs. The standing of the bank is based upon its voluntary act of allowing customers of the travel agency to charge back their credit card charges, with notice to the travel agency.

The second count of the complaint charges Negron with breach of the Member Agreement, by accepting credit card charges for telemarketing sales, without permission.

The third count charges Negron with RICO, alleging that the travel agency was the racketeering enterprise, which committed crimes of mail fraud and wire fraud.

The fourth count is for punitive damages.

Just prior to trial, defense counsel moved to be relieved on grounds that Garie Negron was without funds to continue to pay him, without disclosing how much had been paid to date. He alleged there were irreconciable differences between counsel and client, without particularizing what they might be. The Court relieved defense counsel and refused to appoint new counsel, requiring Garie Negron to proceed to trial without assistance.

THE TRIAL

The non-jury trial was commenced against GARIE NEGRON alone, the codefendants having settled with Banco de Ponce for the sum of thirty thousand dollars. As herein pointed out, the Court relieved defense counsel, leaving Garie Negron to fend for herself.

Counsel for the bank made the following opening statement:

> "We will prove that the defendant intentionally and without Banco de Ponce's authorization and knowledge engaged in a telemarketing scheme whereby it sold to persons receiving their unsolicited telephone calls, travel agents tour packages and other services based upon false and fraudulent promises. In carying out thi fraudulent scheme the defendant knew that the marjority, if not all of the persons called would thereafter reject the charges made against their Visas and Mastercharge cards causing chargebacks to the account of Best Rate at Banco de Ponce which is the plaintiff.
> We will show that defendant breached her contract with Banco de Ponce by failure to comply with the terms of the Mastercharge-Visa member agreement with Banco de Ponce and we will attempt to show that the defendant Garie Negron was engaged in a pattern of corrupt racketeering and we will attempt to ask for the cost of this suit including attorney fees."

PLAINTIFF BANK's CASE

Fred Dominguez testified that he is an Assistant Manager of the Banco de Ponce. Robert Maisonet, no longer with the bank, was branch manager of the Graham Avenue branch. He testified that he was unable to locate Mr. Maisonet. As a result, the Court granted the bank's motion to have the testimony of Mr. Maisonet given at the hearing, challenging the restraining order of Garie Negron's property, held on March 2nd, 1988.

Mr. Maisonet had testified previously, that Garie Negron came to the Graham Avenue branch, where she opened a Visa-Mastercard Charge Merchant account, for her travel agency located at 100-05 Atlantic Avenue.

He testified that for the month ending May 30th, 1987, there were $33,711 in credit card deposits, with a closing balance of $19,035.41. For the month ending June 30th, 1987, there were deposits of $149,454, with a closing balane of $48,994.72. For the month ending July 31st, 1987, there were deposits of $168,809.24, with a closing balance of $26,002.25. For the month ending August 31, 1987, there were no deposits, with a closing balance of $3,497.10. For the month ending September 30, 1987, there were no deposits, with a closing balance of $11,645.90. He testified that chargebacks were received from customers "for whatever reason," which caused the subsequent overdrafts. He was then asked that "as of right now", what was the overdraft for the travel agency. The answer was some $47,000.

Counsel for the bank summarized the deposition of Mr. Maisonet, representing, "she deposited charge slips in excess of $300,000 and gradually depleted the funds in the

account." However, since Garie Negron was not represented by counsel, no one was present to protect her interests and point out that a travel agent has the obligation to pay the provider for the trips she sells, which would account for withdrawals. Apparently, these payments to the travel providers were made by the codefendants in Florida, from funds sent by Garie Negron in New York. Mr. Valdez represented that there was an overdraft of approximately $47,000.

Mr. Valdez explained the mechanics of credit card shopping. He explained that the merchant is given credit for credit card sales slips and therefore, should be financially reliable. (A126-7) Mr. Valdez testified that Banco de Ponce did not want telemarketing business, where the customer does not sign the sales slip, but orders merchandise over the telephone, such as "Home Shopping." It appeared that one hundred percent of the business of Garie Negron's travel agency, Best Rate, was telemarketing.

Mr. Valdez defined a chargeback as "a situation that occurs when a person purchases anything, a service, merchandise with their credit card and subsequently feels that either the qualify of the merchandise or the service was not performed, or their card was used fraudulently and they refuse to pay and honor the charge, so they go their bank and send it back to the system. It's almost like a stop payment. Of course, there are chargebacks that occur through errors, the credit card numbers are wrong, they perhaps were forgotten and not processed. There are different types of chargebacks, some can be corrected others cannot."

The bank received about ont thousand chargebacks in this account, but could not produce any, since they are in the possession of the Queens County Districe Attorney

(that obviously never saw fit to bring any criminal proceedings.) Therefore, no evidence of a single chargeback was presented during the trial, nor the reason given by the customer for any specific chargeback.

Valdez and Maisonet went to the travel agency. When they found it was closed, they terminated the account. Garie Negron telephoned Valdez, who told her that the only way the account could remain open would be with collateral of approximately one hundred thousand dollars, against chargebacks. Garie Negron never settled the account.

Mr. Valdez represented to the court that the cocdefendants repaid thirty thousand dollars of the debit balance.

Garie Negron, called as a witness, testified her son-in-law was selling special rate tours, the low rates being available, because the trips were non-refundable. (A139) He prevailed upon her to obtain a Visa/Mastercard Member agreement with a bank and she did with Mr. Maisonet, whom, she claimed never visited her place of business. Her son-in-law told her that she could earn some money, by opening an account to clear credit card sales. The moneys she drew from her account, were wired to her Florida correspondent, the codefendants.

She also testified that according to the information, she received, crediting the thirty thousand dollars paid by the codefendants, there was a balance of nineteen thousand dollars.

She also testified that the money was sent to Florida not to defraud anyone, but to pay the travel supplier for the services provided. Thus, where a trave agent is paid

for airline accommodations, the agent must remit a large portion of the payment to the airline. In addition, some tours are sold at very low prices, with no right to cancel and therefore, the bank had no right to chargeback such type of accommodation. A discounted tour cannot be canceled. Sometimes, people would buy such tour, and be unable to take it. Under such circumstances, they would understandably seek a refund. The bank had no right to change the terms of the contract and give a refund, where the sale was marked final.

Garie Negron was given permission to return home to get her bank statements. SHe did and handed them up to the Court, which reflected that the debit balance was much lower than claimed by the bank.

The bank then recalled Fred Dominguez to change the false testimony he gave on direct examination.

According to Mr. Dominguez, the Best Rate debit balance as of February 27th, 1988 was $5,854.50. The statement reflected a credit for $7,947.44, which Mr. Dominguez explained, as follows: From the $30,000 settlement paid by the codefendants, the bank allocated $22,000 as legal fees, leaving a credit to the account of $7,947.44. When the account closed, the account had a debit balance of $41,606.06.

THE DECISION

The Court found Garie Negron guilty of violating the RICO statute, finding that she had engaged "in a fraudulent telemarketing scheme." The court found that "defendant wa in many instances selling phony or misrepresented travel packages by telephone. When the charges on the slips reached plaintiff and it credited the funds to the checking account, defendant withdrew funds from the account. After customers discovered the true terms of the misrepresented travel packages, they often cancelled their purchases, causing chargebacks, or debits, to the checking account."

However, in calculating damages, the Court credited the entire $30,000 payment by the codefendants to the $41,606.06, leaving a debit balance of $11,606.06, which the Court tripled to $34,818.18, adding $20,357.44 attorney's fees, for a total of $55,175.62.

THE COURT COMMITTED ERROR IN RELIEVING THE ATTORNEY FOR GARIE NEGRON ON HIS CLAIM OF A FEE DISPUTE AND IRRECONCILABLE DIFFERENCES, WITHOUT ANY FACTUAL SHOWING TO SUPPORT THE CLAIM.

Defense counsel entered into a binding contract with Garie Negron to represent her in this litigation. His contractual obligations was no different than that of any other party to a contract.

Prior to trial, defense counsel, as part of a motion for a jury trial and other relief, moved to be relieved, making the conclusory arguments that he was not being adequately paid and there were differences between counsel and

client. Without making inquiry as to what the differences were between counsel and client, both in respect to fee and in respect to strategy, the Court summarily relieved counsel, leaving Garrie Negron to fend for herself.

A contract retaining an attorney is no different than any other contract and an attorney, like any other litigant should not be relieved from his obligations. *Hashemi v. Schack*, 609 F. Supp. 391 (D.C. N.Y., 1984) The Court abused its discretion in relieving defense counsel, without inquiry. Indeed, the papers of defense counsel were conclusory. There was no allegation as to the financial terms of the retainer, and the amount allegedly owing. There was no specification as to the differences between attorney and client, to at least, afford the Court opportunity to try to resolve them.

The order of the Court merely authorized counsel to abandon his client, leaving Garie Negron virtually helpless on trial. Where this was done without inquiry as to the factual cause for disension, the judgment should be reversed and a new trial ordered.

NO EVIDENCE WAS PRESENTED THAT THE PROXIMATE CAUSE OF THE BANKS LOSSES WAS A RACKETEERING ENTERPRISE AND RACKETEERING ACTS, GIVEN THAT THE BANKS LOSSES WERE SELF IMPOSED

The only witnesses called were bank employees, who irresponsibly referred to the telemarketing of travel packages, as fraudulent. The record does not refer to a single customer of the travel agency, claiming to be defrauded. The record fails to describe the terms and conditions of any travel package. The record fails to indicate that appellant ever improperly obtained the credit card

numbers from customers. Indeed, it was brought out that Banco de Ponce referred this matter to the Queens County District Attorney. SInce no prosecution ever resulted from the referral, it is obvious that the District Attorney found no crimnality.

The theme advanced by the bank that it did not permit telemarketing is in conflict with paragraph 4 and 5 of the Member Agreement, which recites as follows:

> "4. If Member permits a Cardholder to make a purchase without presenting his Card, Member shall (1) print legibly on the sales slip the Cardholder's number. . . ."

Paragraph "4" of the Member Agreement would seem to contemplate telemarketing. Otherwise, there would not be an authorization to allow purchases by customers without presenting his credit card. However, any doubt concerning telemarketing is resolved in paragraph 5, which specifically provides for the latter type of distribution:

> "5. If, at Member's option, a Cardholder effects a purchase by telephone order ("TO") or mail order ("MO"), the procedures provided for in Paragraph 4 shall be followed except that on the sales slip Member shall sign his name. . . ."(A34)

The bank and its lawyers deliberately mislead the Court by claiming that telemarketing was prohibited. Paragraph "5" of the Member Agreement specifically provides that telemarketing is specifically authorized.

Introduced into evidence by the bank was the testimony given by Maisonet at the hearing in connection with the restraining order, who testified that the

chargebacks were "for whatever reason." Neither the decision of the Court below nor the testimony particularizes any alleged fraud perpetrated by GARIE NEGRON.

It is self evident that a bank does not have *carte blanche* to chargeback any and all credit slips on demand. This is especially so, in the travel business, where many packages are sold on a no refund policy. What apparently occurred in the case at bar was that any customer requesting of the bank cedit, got it on demand.

Indeed, paragraph "10" of the Member Agreement limits the warranty of the Member as follows:

> "Member warrants, represents and covenants with respect to each sales slip delivered to Bank as follows: that the slip arose from a bona fide and legal sale in the ordinary course of business in which Member gave value, that no defense, offset, counterclaim or dispute exists or shall arise to such transaction, that Member has not employed any scheme or device to evade the maximum applicable floor limit. . . ."

No showing was made that any sale was made, without full consideration to the customer. Indeed, although the third count charges defendants with mail and wire frauds to constitute essentials of a RICO complaint, there is no specifics concerning the identity of the customer or the content of the transaction or reprsentation that constituted fraud. Nor does the trial record descend to particulars. It cannot be that a Member violates the RICO statute, where a bank blindly elects to credit a customer, without inquiry into the customer complaint, merely to maintain its goodwill.

No showing was made that any racketeering act was the proximate cause of the losses suffered by the bank. *Burdick v. American Express Co.*, 677 F. Supp. 228 (S.D.N.Y., 1988), aff'd, 865 F.2d 527 (Snd Circ., 1989). The losses sustained by the bank, were not shown to be the proximate cause of any conduct by Garie Negron, but rather the election of the bank to crdit customers on demand, withut consultation with the member. Therefore, the vital ingredient of proximate cause from racketeering activity is missing from the bank's case. *Bastian v. Petren Resources Corp.*, 699 F. Supp. 161 (N.D.I11., 1988) Any loss by the bank was self-imposed.

Beyond that, it is essential for a racketeering complaint to stand, that a minimum of two racketeering acts be pleaded and proven. *United States v. Indelicato*, 865 F.2d 1370 (2nd Circ., 1989). These specific racketeering acts must be shown to constitute a pattern. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Here, none were proven.

Moreover, the evidence at the trial reflected that the Travel Agency was out of business. The Supreme Court has held that a showing must be made "that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. . . .where the predicates can be attributed to a defendant operating as part of a long term association that exits for criminal purposes." *H.J. Inc. v. Northwestern Bell*, 109 S.Ct. 2893 (1989).

Any damages suffered by the bank were self-imposed. The bank elected to credit customers, without any consultation with its Member. No matter what warranties it is claimed that a Member makes to the bank, it cannot be that they encompass indemnification, where the bank elects to credit customers to maintain its goodwill, without

any investigation whether the customer complaint is meritorious. Thus, there was no basis for any recovery against Garie Negron. Surely, there was no basis for treble damages and an award of attorney's fees, given a total failure of proof of RICO.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari to prohibit the use of the RICO statute in purely civil matters, as in the case at bar, where the damages of the bank were self-created by crediting customers, solely for goodwill, and thereby causing an overdraft of a VISA-MASTERCARD customer, and not the proximate cause of any racketeering act. In addition, this Court should grant Certiorari to consider whether a Federal Court may relieve counsel for a party, without the party's consent.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of October, one thousand nine hundred and ninety.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE ROGER J. MINER

Circuit Judges,

HONORABLE MILTON POLLACK

*District Judge**

BANCO DE PONCE,

Plaintiff-Appellee,

v.

GARIE NEGRON a/k/a GARIE CARDONA, IRWIN SHAPIRO a/k/a "CHUCK SHAPIRO, JOSEPH MAIURO, DELCO TOURS, INC., "AAA HOLIDAYS INTERNATIONAL OF SOUTH FLORIDA, INC., THE FIVE DEFENDANTS LAST NAMED DOING BUSINESS UNDER THE ASSUMED NAME OF S/E PLAYERS,

---

*Hon. Milton Pollack, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Defendants,

GARIE NEGRON,

Defendant-Appellant.

Garie Negron, *pro se*, appeals from a judgment entered against her on January 2, 1990 for violations of the Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961 *et seq.* (1984) (RICO)

by the United States District Court for the Eastern District of New York (Nickerson, J.), which ordered Negron to pay Banco de Ponce (Banco) $34,818.18 for treble damages ($11,606.06 x 3), and $20,357.44 for attorney's fees, for a total of $55,176.12.

Subsequent to appellant's filing of a notice of appeal on January 11, 1990, Banco wrote a letter to Judge Nickerson requesting an amendment of the damages calculation, which resulted in an amended judgment dated July 16, 1990 that increased the liability on appellant Negron from $55,176.12 to $79,018.44. No appeal was taken from the amended judgment. But, because Banco's letter to Judge Nickerson was not a formal motion, and because Negron is a *pro se* litigant with no understanding of the effect of Fed. R. App. P. 4(a)(4), *see McCowan v. Sears, Roebuck and Co.*, Nos. 918, 1197, slip op. (2d Cir. May 25, 1990), we have decided to reach the merits of the original judgment, as amended on account of an arithmetical recalculation, dated July 16, 1990.

That judgment in the amount of $79,018.44 is affirmed for the reasons stated in Judge Nickerson' thorough opinion dated February 21, 1990.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/ Roger J. Miner
Roger J. Miner, U.S.C.J.

s/ Milton Pollack
Milton Pollack, U.S.D.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

BANCO DE PONCE,

Plaintiff,

-against-

GARIE NEGRON, et al.,

Defendant.

----------X

LOPEZ & ROMERO, ESQS.
New York, New York
for plaintiff

GARIE NEGRON
Queens, New York
defendant *pro se*

NICKERSON, District Judge

Plaintiff brought this action under 18 U.S.C. §1961 *et seq.* (1982 & Supp. IV 1986), the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law. Garie Negron is the only remaining defendant and is appearing *pro se.*

Plaintiff bank claims that defendant Negron engaged in a fraudulent telemarketing scheme. Plaintiff, which has settled with the other defendants, unwittingly advanced some $300,000 to finance the scheme and sustained damages. Defendant obtained from plaintiff a checking

account and a Visa/Mastercharge Merchant service account (the account), both for the use of the travel agency operated by defendant under the name A Best Rate Travel (Best Rate). Under the arrangement for a merchant service account, plaintiff allowed defendant to accept credit card slips as payment for goods and services. When defendant presented the slips to plaintiff it would credit the amount of the charges to defendant's Best Rate checking account.

In fact defendant was in many instances selling phony or misrepresented travel packages by telephone. When the charges on the slips reached plaintiff and it credited the funds to the checking account, defendant withdrew funds from the account. After customers discovered the true terms of the misrepresented travel packages, they often cancelled their purchases, causing chargebacks, or debits, to the checking account.

After noticing an inordinate number of chargebacks to the account and discovering that Best Rate was out of business, plaintiff closed the account. As of July 31, 1987, defendant had deposited a total of $294,873 in credit card slips in the checking account. During 1987 she withdrew about $157,000 from the account and transferred more than $87,000 to her co-defendants in Florida.

When plaintiff closed the checking account, it had a debit balance of $41,606.06. Plaintiff received $30,000 in settlement from the other defendants. However, plaintiff credited itself with $7,947.44 of that amount as attorneys fees and costs incurred in collecting from the other defendants, and now claims from defendant $19,553.250, to be trebled under 18 U.S.C. §1964(c), plus costs and atorneys fees.

The court finds no evidence in the record to justify plaintiff in applying to attorneys fees $7,947.44 of the $30,000 received in settlement from the other defendants. The court therefore finds that the damages for which plaintiff has not been reimbursed is $11,606.06.

Of course, defendant is responsible for this amount under New York State law. The question remains whether plaintiff has proven a RICO claim and is entitled to treble damages and attorneys fees. Ordinarily this court would not have supposed that plaintiff's acts were sufficiently analogous to those of an organized crime figure as to justify a finding that she has been guilty of a RICO violation. *See Bernstein* v. *Crazy Eddie, Inc.*, 702 F. Supp. 962 (E.D.N.Y. 1988) and cases cited.

However, the Second Circuit has given that statute such an expansive interpretation, *see* ***Beauford*** **v.** ***Helmsley***, 865 F.2d 1386 (2d Cir. 1989), ***vacated and remanded to Court of Appeals***, 109 S. Ct. 3236, ***reasoning aff'd and remanded***, slip op. 87-7216 (2d Cir. 9/15/89), that it appears this court is required to hold that defendant has violated 18 U.S.C. §1962.

Defendant, or she and her co-defendants, met the definition of an "enterprise." She engaged in activities which affected interstate commerce and participated in the conduct of the enterprise's affairs through a "patern of racketeering activity," as the Second Circuit has construed 18 U.S.C. §1961(5). By causing numerous mailings and telephone calls to be made in 1987, defendant violated the mail fraud statute 18 U.S.C. §1341, as well as the wire fraud statute, 18 U.S.C. §1343.

Perhaps Congress thought, as the Second Circuit said, "that in order to reach members of organized crime,

it was worth reaching others as well, "*Beauford, supra*, 865 F.2d at 1393, even an offender so insignificant as defendant. However, if this defendant is held to have committed a RICO violation then it is hard to conceive of many state business fraud cases that are not covered by RICO, and Congress has acted the part of a modern day Pygmalian creating not a beautiful Galatea, but an unexpected and imposing monster inflicting consequences wholly disproportionate to the offenses committed by persons such as defendant.

This court follows what it understands to be the Second Circuit's holding and concludes that plaintiff is liable for not only $11,606.06 but also for treble damages, attorneys fees and costs.

Plaintiff has submitted a statement of attorney's fees and costs in the amount of $47,160.21. After reviewing the complexity of the issues involved, the court determines the hours expended to be reasonable, but the fee to be slightly excessive. The court considers a fee of $140 per hour for Mr. Lopez and $100 for other counsel to be reasonable. In addition, recovery of fees against Negron for work done in preparing the action against the Florida defendants with which plaintiff settled is improper. Thus the court determines a quarter of the fees for the 11/30/87 and the 11/9/87 billing, a third of the 4/30/88 and 3/7/88 billing, and the total of the 10/31/89 and 9/6/89 billing should be attributed to defendant Negron. Total hours worked by Mr. Lopez and the other attorneys are thus 50.86 and 125.33 respectively. At the average rates listed above, $19,652.90 worth of fees are attributable to the case against defendant. In addition, using the same ratios discussed above, plaintiff expended $704.54. in costs. Thus costs and attorney's fees equal $20,357.44.

Thus defendant is liable for $34,818.18 for treble damages and $20,357.44 for attorney's fees for a total of $55,175.62.

So ordered.

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Dated: Brooklyn, New
December 26, 1989